



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 920

[Doc. No. AMS-FV-12-0008; FV12-920-1 FR]

**Kiwifruit Grown in California; Order Amending Marketing
Order No. 920**

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends Marketing Order No. 920 (order), which regulates the handling of kiwifruit grown in California. The amendments were proposed by the Kiwifruit Administrative Committee (Committee or KAC), which is responsible for the local administration of the order. The five amendments will provide authority to recommend and conduct production and postharvest research, to recommend and conduct market research and development projects, to receive and expend voluntary contributions, to specify that recommendations for production research and market development be approved by eight members of the Committee, and to update provisions regarding alternate members' service on the Committee. These amendments are intended to improve administration of and compliance with the order, as well as reflect current industry practices.

DATES: This rule is effective [INSERT DATE 1 DAY AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Melissa Schmaedick, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, Post Office Box 952, Moab, UT 84532; Telephone: (202) 557-4783, Fax: (435) 259-1502, or E-mail: Melissa.Schmaedick@ams.usda.gov; or, Michelle Sharrow, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW, Stop 0237, Washington, DC 20250-0237; Telephone: (202) 720-9921, Fax: (202) 720-8938 or E-mail: Michelle.Sharrow@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Jeffrey Smutny, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Jeffrey.Smutny@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 920, as amended (7 CFR part 920), regulating the handling of kiwifruit produced in California, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674),

hereinafter referred to as the "Act." Section 608c(17) of the Act and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900) authorize amendments of the order through this informal rulemaking action.

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 12866, 13563, and 13175.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule shall not be deemed to preclude, preempt, or supersede any research and market development provisions of any State program covering California kiwifruit (7 U.S.C. 608c(6)(I)).

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would

rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of entry of the ruling.

Section 1504 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) (Pub. L. 110-246) amended section 18c(17) of the Act, which in turn required the addition of supplemental rules of practice to 7 CFR Part 900 (73 FR 49307; August 21, 2008). The amendment of section 18c(17) of the Act and additional supplemental rules of practice authorize the use of informal rulemaking (5 U.S.C. 553) to amend Federal fruit, vegetable, and nut marketing agreements and orders. USDA may use informal rulemaking to amend marketing orders based on the nature and complexity of the proposed amendments, the potential regulatory and economic impacts on affected entities, and any other relevant matters.

AMS considered the nature and complexity of the proposed amendments, the potential regulatory and economic impacts on affected entities, and other relevant matters, and determined that amending the order as proposed by the

Committee could appropriately be accomplished through informal rulemaking.

The proposed amendments were unanimously recommended by the Committee following deliberations at public meetings on July 12 and December 13, 2011. A proposed rule soliciting comments on the proposed amendments was issued on February 4, 2013, and published in the **Federal Register** on February 8, 2013 (78 FR 9331). Three comments were received. Two comments were supportive of the proposed amendments. The third comment was supportive of some of the proposed amendments and not supportive of others. A proposed rule and referendum order was issued on July 29, 2013, and published in the **Federal Register** on August 2, 2013 (78 FR 46823). This document directed that USDA conduct a referendum among kiwifruit producers who produced kiwifruit during the period of August 1, 2012, through July 31, 2013, to determine whether they favored the proposed amendments to the order. To become effective, the amendments had to be approved by at least two-thirds of the producers voting or two-thirds of the volume of kiwifruit represented by voters in the referendum. All of the proposed amendments were favored by at least 80 percent of those voting in the referendum and by at least 83 percent

of the volume represented in the referendum.

The amendments included in this final rule will:

- (1) Provide authority to recommend and conduct production and postharvest research;
- (2) Provide authority to recommend and conduct market research and development projects;
- (3) Provide authority to receive and expend voluntary contributions;
- (4) Amend procedures to specify that recommendations for production research and market development be approved by eight members of the Committee; and
- (5) Clarify provisions regarding alternate members' service on the Committee.

Final Regulatory Flexibility Analysis

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or

disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

Based on Committee data, there are approximately 175 producers and 27 handlers of kiwifruit in the California production area. The Small Business Administration (SBA) defines small agricultural producers as those having annual receipts of less than \$750,000, and small agricultural service firms are defined as those having annual receipts of less than \$7,000,000. (13 CFR 121.201)

The California Agricultural Statistical Service (CASS) reported total California kiwifruit production for the 2011-12 season at 37,700 tons, with an average price of \$775 per ton. Based on the average price, shipment, and grower information provided by the CASS and the Committee, the majority of kiwifruit handlers would be considered small businesses under the SBA definition. In addition, based on kiwifruit production and price information, as well as the total number of California kiwifruit growers, the average annual grower revenue is less than \$750,000. Thus, the majority of California kiwifruit producers may also be classified as small entities.

The amendments will provide authority to recommend and conduct production and postharvest research; provide authority to recommend and conduct marketing research and development projects; provide authority to receive and expend voluntary contributions; amend procedures to specify that recommendations for production research and market development be approved by eight members of the Committee; and update provisions regarding alternate members' service on the Committee.

These amendments were unanimously recommended at public meetings of the Committee held on July 12 and December 13, 2011. None of these amendments will have an immediate impact on handlers or producers because they will not establish any requirements or regulations on handlers. However, the amendments will add authority to conduct production and postharvest research as well as market research and development projects. In the event the Committee decides to conduct these activities in the future, there would be a cost associated with funding any projects recommended.

Research activities were previously funded by the industry through the California Kiwifruit Commission (CKC), which no longer exists. Therefore, there would be no net

overall increase in costs to the industry if the Committee chose to take over projects previously funded through the CKC. Furthermore, the newly established authority for the Committee to accept voluntary contributions could provide additional sources of funds and reduce the amount of assessment monies otherwise needed to fund research activities.

Although there would be a cost associated with any research activities undertaken by the industry, the benefits of such activities would be expected to outweigh the costs. Past benefits of production research to the California kiwifruit industry include improved techniques for establishing vineyards, pruning, thinning, irrigating, pollination, fertilizer application, disease and pest management, and harvesting. Benefits of postharvest research include improved methods of fruit storage, packaging, and transportation. These research results have been disseminated to growers and handlers in the past and have been instrumental in maintaining a viable kiwifruit industry in California.

Prior to undertaking any research activities, the Committee would evaluate potential projects and weigh their costs against the potential benefits to the industry. Any

projects recommended by the Committee would be reviewed and approved by USDA before implementation. The Committee and USDA would provide oversight to help ensure that the goals and objectives were being met. The results would be disseminated to industry members and would also be made available to the public.

Adding authority to the order for marketing research and development projects will not result in immediate costs to the industry. It will provide authority to recommend marketing research and development activities. In the event the Committee decides to undertake these activities in the future, there would be a cost associated with funding any marketing research and development projects.

Like the production and postharvest research activities discussed above, marketing research and development projects could also be funded with voluntary contributions. This could help mitigate any possible assessment rate increases to offset the costs of these activities. To the extent that the assessment rate may need to be increased, any increase would be limited to remain within the maximum level authorized under § 920.41 of the order.

Any increased costs associated with marketing research

and development activities are expected to be outweighed by the benefits. Marketing research could be conducted on consumer tastes and preferences. This type of information is valuable in developing marketing strategies. Collection of market data can also be used to evaluate prior programs and to develop future programs. Market development programs could be used to conduct activities designed to increase consumer awareness and demand for California kiwifruit. These demand-building activities would be expected to increase sales, which would ultimately increase producer returns.

Prior to undertaking any marketing research and/or market development activities, the Committee would evaluate potential projects and their costs against the potential benefits to the industry. Any projects recommended by the Committee would be reviewed and approved by USDA before implementation. The Committee and USDA would provide oversight to help ensure that the goals and objectives were being met. In addition, as required by the Federal Agricultural Improvement and Reform Act of 1996, any marketing research and development programs engaged in under a Federal marketing order require periodic evaluation by an independent third party to ensure that they are

effective. Thus, any such programs conducted under the kiwifruit order would be evaluated to ensure that the benefits exceed the costs.

Adding authority for the Committee to receive voluntary contributions will provide an additional monetary source to help fund research and development programs. These types of programs are intended to benefit the entire industry. This change will not increase or decrease any reporting, recordkeeping, or compliance costs. Acceptance of voluntary financial contributions by the Committee would not result in increased costs. Rather, it might reduce the amount of assessment revenue needed to fund programs.

Amendments four and five relate to voting procedures and alternate member service on the Committee. Both are procedural in nature and will have no economic impact on producers or handlers. They will not establish any regulatory requirements on handlers and will also not result in any assessment or funding implications. There will be no change in financial costs, reporting, or recordkeeping requirements.

Alternatives to these proposals, including making no changes at this time, were considered. However, the Committee believes it would be beneficial to have the

ability to conduct production research and market development activities, collect voluntary contributions, and clarify procedural language for Committee meetings.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581-0189, Generic OMB Fruit Crops. No changes in those requirements as a result of this proceeding are anticipated. Should any changes become necessary, they would be submitted to OMB for approval.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

In addition, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

The Committee's meetings, at which these proposals were discussed, were widely publicized throughout the California kiwifruit industry. All interested persons were invited to attend the meetings and encouraged to participate in Committee deliberations on all issues. The Committee meetings were public, and all entities, both large and small, were encouraged to express their views on these proposals.

A proposed rule concerning this action was published in the **Federal Register** on February 8, 2013 (78 FR 9331). Copies of the rule were mailed or sent via facsimile to all Committee members and kiwifruit handlers. Finally, the rule was made available through the internet by USDA and the Office of the Federal Register. A 60-day comment period ending April 9, 2013, was provided to allow interested persons to respond to the proposal.

Three comments were received. Two comments were supportive of the proposed amendments.

The third commenter supported the amendments to §§ 920.32 and 920.45 concerning Committee quorum (voting) and accepting voluntary contributions, respectively. However, the commenter was opposed to the amendment to § 920.27 regarding alternate member procedures that will allow

substitute alternates, from within the same district, to represent absent members at Committee meetings in districts with two or more members because he was concerned that it gave the Committee the opportunity to choose an alternate who shared their views. The change will improve the likelihood that quorum requirements are met. This should ensure a timely and orderly flow of business so that important matters would not have to be postponed. The substitute alternate would only be called upon if the member and their designated alternate were both absent. Because the substitute would be from the same district as the absent member and alternate, it is more likely that the substitute would represent the views of other growers in that district.

In 2010, the order was amended and the number of districts decreased to three. Each district is now represented on the Committee by two, four, or five members and alternate members, for a total of twenty-two grower positions. However, § 920.27 only addresses alternate members' service on the Committee in districts with one and two grower positions. This amendment addresses alternate members' service on the Committee in districts with more than two members, as well as substitute alternates if both

a member and his or her respective alternate are unable to attend a Committee meeting. In such situations, the Committee will be authorized to designate any other alternate present, in the same district, to serve in place of the absent member. Accordingly, no change to the amendment based on the comment received is being adopted.

The commenter was also opposed to the amendment to § 920.48 regarding marketing research and development because he believes each marketer should conduct their own market promotion. The Act authorizes the establishment of marketing research and development projects, including paid advertising, for certain commodities; however, paid advertising is not authorized for kiwifruit. (7 U.S.C. 608c(6)(I)) The Committee developed this amendment taking into account that the CKC is no longer conducting such activities. One purpose of such generic programs is to benefit all members of the kiwifruit industry, including those that could not fund their own programs. As such, adding authority in the order for market research and development projects will benefit the entire kiwifruit industry. Therefore, no change to the proposed amendment is being adopted as a result of this comment.

The commenter only supported the amendment to add authority to § 920.47 to conduct production and postharvest research if the quorum requirement of eight votes passes in § 920.32. The commenter wanted to either eliminate or link the two proposed amendments. Such a change would not have allowed the voters to consider each proposal on its own merits. Currently, the order requires an eight vote plurality for any changes for expenses, assessments, or recommended regulations in § 920.32. The Committee unanimously supported requiring eight votes for approval of marketing research and development as well as production and postharvest research activities. Requiring at least eight votes would ensure that a broad base of support existed for any major actions that would affect the budget. Further, the Committee believes, and USDA concurs, that this requirement will help ensure that industry support exists before undertaking these activities. The commenter was supportive of adding the quorum voting requirement for production and postharvest research, and the commenter was in favor of production and postharvest research. Accordingly, no changes were made to the proposed amendments as a result of this comment.

A proposed rule and referendum order was issued on July 29, 2013, and published in the **Federal Register** on August 2, 2013 (78 FR 46823). This document directed that USDA conduct a referendum among kiwifruit producers who produced kiwifruit during the period of August 1, 2012, through July 31, 2013, to determine whether they favored the proposed amendments to the order. To become effective, the amendments had to be approved by at least two-thirds of the producers voting or two-thirds of the volume of kiwifruit represented by voters in the referendum. All of the proposed amendments were favored by at least 80 percent of those voting in the referendum and by at least 83 percent of the volume represented in the referendum.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at:
<http://www.ams.usda.gov/MarketingOrdersSmallBusinessGuide>. Any questions about the compliance guide should be sent to Jeffrey Smutny at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

**Order Amending the Order Regulating the Handling of
Kiwifruit Grown in California
Findings and Determinations**

(a) Findings and Determinations Upon the Basis of the
Rulemaking Record.

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the marketing order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

1. The marketing order, as amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

2. The marketing order, as amended, and as hereby proposed to be further amended, regulates the handling of kiwifruit grown in California in the same manner as, and is applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing order;

3. The marketing order, as amended, is limited in application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not

effectively carry out the declared policy of the Act;

4. The marketing order, as amended, prescribes, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of kiwifruit produced or packed in the production area; and

5. All handling of kiwifruit produced in the production area as defined in the marketing order is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

(b) Additional Findings.

It is necessary and in the public interest to make these amendments effective not later than one day after publication in the **Federal Register**. A later effective date would unnecessarily delay implementation of the amendments. These amendments should be in place as soon as possible so that any regulations recommended as a result of these amendments can be in place prior to the next production year, which begins on August 1. In view of the foregoing, it is hereby found and determined that good cause exists for making these amendments effective one day after publication in the **Federal Register** and that it would

be contrary to the public interest to delay the effective date for 30 days after publication in the **Federal Register**. (Sec. 553(d), Administrative Procedure Act; 5 U.S.C. 551-559.)

(c) Determinations. It is hereby determined that:

1. Handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping kiwifruit covered under the order) who during the period August 1, 2012, through July 31, 2013, handled not less than 50 percent of the volume of such kiwifruit covered by said order, as hereby amended, have not signed an amended marketing agreement; and

2. The issuance of this amendatory order, amending the aforesaid order, is favored or approved by at least two-thirds of the producers who participated in a referendum on the question of approval and who, during the period of August 1, 2012, through July 31, 2013, have been engaged within the production area in the production of such kiwifruit, such producers having also produced for market at least two-thirds of the volume of such commodity represented in the referendum.

Order Relative to Handling

It is therefore ordered, That on and after the

effective date hereof, all handling of kiwifruit grown in California shall be in conformity to, and in compliance with, the terms and conditions of the said order as hereby amended as follows:

The provisions of the proposed marketing order amending the order contained in the proposed rule issued by the Administrator on July 29, 2013, and published in the **Federal Register** on August 2, 2013 (78 FR 46823), shall be and are the terms and provisions of this order amending the order and are set forth in full herein.

List of Subjects in 7 CFR Part 920

Marketing agreements, Kiwifruit, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR Part 920 is amended as follows:

PART 920 - KIWIFRUIT GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 920 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. Revise § 920.27 to read as follows:

§ 920.27 Alternate members.

An alternate member of the committee, during the absence of the member for whom that individual is an

alternate, shall act in the place and stead of such member and perform such other duties as assigned. In the event both a member and his or her alternate are unable to attend a committee meeting, the committee may designate any other alternate member from the same district to serve in such member's place and stead. In the event of the death, removal, resignation, or disqualification of a member, the alternate of such member shall act for him or her until a successor for such member is selected and has qualified.

3. Revise § 920.32(a) to read as follows:

§ 920.32 Procedure.

(a) Eight members of the committee, or alternates acting for members, shall constitute a quorum and any action of the committee shall require the concurring vote of the majority of those present: Provided, That actions of the committee with respect to expenses and assessments, production and postharvest research, market research and development, or recommendations for regulations pursuant to §§920.50 through 920.55, of this part shall require at least eight concurring votes.

* * * * *

4. Add § 920.45 to read as follows:

§ 920.45 Contributions.

The committee may accept voluntary contributions, but these shall only be used to pay expenses incurred pursuant to § 920.47 and § 920.48. Furthermore, such contributions shall be free from any encumbrances by the donor, and the committee shall retain complete control of their use.

5. Add § 920.47 to read as follows:

§ 920.47 Production and postharvest research.

The committee, with the approval of the Secretary, may establish or provide for the establishment of projects involving research designed to assist or improve the efficient production and postharvest handling of kiwifruit.

6. Add § 920.48 to read as follows:

§ 920.48 Market research and development.

The committee, with the approval of the Secretary, may establish or provide for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of kiwifruit.

Dated: May 22, 2014

Rex A. Barnes
Associate Administrator
Agricultural Marketing Service

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